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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
(Honorable Salvador Mendoza, Jr.)**

UNITED STATES OF AMERICA,)	
Plaintiff,)	NO. 1:19-CR-02032-SMJ-2
vs.)	
)	DEFENSE MOTION AND
JAMES DEAN CLOUD and)	MEMORANDUM IN SUPPORT OF
DONOVAN CLOUD,)	DEFENSE PROPOSED
Defendant.)	PROTECTIVE ORDER
)	
)	Note for Hearing
)	November 6, 2020 at 6:30 p.m.
)	Without Oral Argument
)	
)	
)	

Defendants jointly, by and through counsel, Lorinda Youngcourt, Jeremy Sporn and John McEntire on behalf of James Cloud, and Richard Smith and Mark A. Larrañaga on behalf of Donovan Cloud, respectfully move this Court to adopt the defense proposed protective order.

Defense Memorandum in Support
of Defense Proposed Protective Order

1 During a status conference held on October 27, 2020, both defendants
2 requested the Court reconsider and direct the United States to provide unredacted
3 copies of the discovery. The Court directed the parties to confer and propose a joint-
4 protective order or set out specific provisions that the parties are unable to reach
5 consensus. The parties have conferred and are unable to reach agreement on one
6 primary issue: disclosure of unredacted materials to their clients. The government's
7 proposed protective order prohibits defense counsel (or defense team) from showing
8 their respective clients unredacted materials until two (2) weeks before trial. The
9 defense's proposed protective order allows defense counsel (or defense team) to
10 review unredacted discovery with their respective clients but with significant
11 restrictions and limitations.

12 The defense believes its proposed protective order reaches a reasonable middle
13 ground allowing the defense to adequately and fully prepare for trial while
14 simultaneously addressing the government's concerns.

15 The defense jointly submit this memorandum in support of its proposed
16 protective order.

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22 I. FEDERAL RULE OF CRIMINAL PROCEDURE 16 REQUIRES
23 THE GOVERNMENT TO MAKE A SHOWING OF GOOD
24 CAUSE BEFORE THE COURT CAN ENTER A PROTECTIVE
25 ORDER
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1 All criminal defendants have a right under Federal Rule of Criminal Procedure
 2 16 to the production of materials the government intends to use in its case-in-chief
 3 at trial. While Rule 16(d)(1) allows this Court, *for good cause*, to “deny restrict, or
 4 defer discovery or inspection, or grant other appropriate relief,” the government has
 5 failed to make any showing of good cause in this case. In determining whether there
 6 is good cause to deny, restrict, or defer discovery, courts typically take into
 7 consideration “the safety of witnesses and others, [and] a particular danger of perjury
 8 or witness intimidation.” Rule 16 (Advisory Committee’s notes (1966
 9 Amendments)). Thus, this Court cannot deny the defendants unrestricted access to
 10 the requested materials absent a showing by the government and a finding by this
 11 Court of “good cause.”
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14 Under Rule 16, the government must make a specific and particularized
 15 factual demonstration of need in this case as to the restriction of specific materials,
 16 and as to these defendants, and it has not done so.¹ Good cause exists “when a party
 17 shows that disclosure will result in a clearly defined, specific and serious injury.”
 18 *United States v. Smith*, 985 F. Supp. 2d 506, 523 (S.D.N.Y. 2013) (internal citations
 19 and quotations omitted). Any finding of harm must be based on “a particular factual
 20 demonstration of potential harm, not on conclusory statements.” *Id.* & 528-530
 21 (discussing failure of government to show specific harm to privacy interests of third
 22 parties). Good cause requires a “particularized, specific showing” rather than “broad
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25 ¹ If the government has done so *ex parte*, the defense has been denied an
 26 opportunity to see and confront the government’s showing.

1 allegations of harm, unsubstantiated by specific examples or articulated reasoning.”
2 *United States v. Bulger*, 283 F.R.D. 46, 52 (D. Mass. 2012) (quoting *United States*
3 *v. Wecht*, 484 F.3d 194, 211 (3rd Cir. 2007)). Importantly, the factual showing is an
4 individual one, and should be made separately as to each defendant. The law requires
5 the government to make a showing of a specific need for a protective order as to
6 these defendants, these charges, and the specified discovery. *See Bulger*, 283 F.R.D.
7 at 53 (while “umbrella protective orders” are “typically made without a
8 particularized showing to support the claim for protection, . . . such a showing must
9 be made whenever a claim under an order is challenged); *see also id.* at 54 (blanket
10 protective orders are by their nature over-inclusive and therefore peculiarly subject
11 to modification (quoting *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 790 (1st
12 Cir. 1988)); *compare, United States v. Shyrock*, 342 F.3d 948, 983 (9th Cir. 2003)
13 (district court entered protective order in large Mexican Mafia RICO case only as to
14 “a miniscule portion of the entire discovery for an eight-month trial,” specifically,
15 “1) twenty-five pages; 2) seven pages; 3) ten pages; 4) a copy of the transcript of the
16 proceeding concerning the first wiretap; and 5) early production of certain witness
17 statements”).
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21 The burden is on the government to demonstrate “good cause” under Rule 16.
22 It has not done so. Instead, the government claims that “due to safety considerations”
23 based solely on the charges it has “a very real concern regarding the safety of
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1 potential witnesses.”² Unless filed *ex parte* and under seal, the government’s
2 assertion fails to provide any evidence which tethers its broad allegation of “safety
3 concerns” to any specific potential witness. For instance, the government has not set
4 forth any declaration or claim from any potential witness that he or she has, in fact,
5 been threatened or intimidated. Nor has the government presented any facts to
6 suggest either defendant has made threats or in any way attempted to intimidate
7 anyone during the year both have been incarcerated.

9 To be clear, the defense is not arguing against a protective order. Rather, the
10 defense submits that the lack of specific facts for the underlying premise warranting
11 a protective order supports the defense’s proposal to allow review with their
12 respective clients unredacted discovery with specific restrictions.

14 II. CONSTITUTIONAL PRINCIPLES.

15 The defendants have important constitutional rights that must be upheld. The
16 Sixth Amendment right to be represented by counsel necessarily includes the right of
17 a defendant to “develop all relevant facts” and to a trial that “is not founded on a
18 partial or speculative presentation of the facts.” *United States v. Nixon*, 418 U.S. 683,
19 709 (1974) (discussing the confrontation clause of the Sixth Amendment). The Sixth
20 Amendment and the Fifth Amendment require that criminal defendants be informed
21 of the charges and provided with the evidence against them because “fairness can
22 rarely be obtained by secret, one-sided determination of decisive facts.” *United States*
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26 ² ECF No. 131 at 4.
Defense Memorandum in Support
of Defense Proposed Protective Order

1 *v. Abuhamra*, 389 F.3d 309, 322 (2d Cir. 2004) (quoting *Joint Anti-Fascist Refugee*
 2 *Comm. v. McGrath*, 341 U.S. 123, 171 (1951)). Under the Sixth Amendment,
 3 “[c]ounsel ha[s] a duty to make reasonable investigations or to make a reasonable
 4 decision that makes particular investigations unnecessary.” *Strickland v. Washington*,
 5 466 U.S. 668, 691 (1984). A “strategic” decision can never be reasonable when the
 6 attorney has failed to investigate his options and make a reasonable choice among
 7 them. *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991). Counsel’s failure to seek
 8 out and review evidence in the possession of the prosecution relevant to guilt or
 9 innocence, or any potential motion, falls below the constitutional standard of an
 10 adequate defense. *Kimmelman v. Morrison*, 477 U.S. 365, 387 (1986). The Ninth
 11 Circuit has recognized that the right to counsel is meaningless unless counsel is
 12 effective and adequately prepared. *United States v. Tucker*, 716 F.2d 576, 579 (9th
 13 Cir. 1983).

16 Effective representation requires due diligence. Due diligence at a minimum
 17 in the criminal context requires investigation and preparation. Therefore, counsel has
 18 an affirmative duty to interview potential witnesses and “make an independent
 19 examination of the facts, circumstances, pleadings and laws involved” to effectively
 20 represent their clients. *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948). The courts
 21 have long recognized that counsel’s failure to investigate and interview potential
 22 witnesses falls below the level of effective representation required by the Sixth
 23 Amendment. *See, e.g., Cody v. Montgomery*, 799 F.2d 1481, 1483 (11th Cir. 1986).
 24 In *Rompilla v. Beard*, 545 U.S. 374 (2004), the Supreme Court explained:
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1 The notion that defense counsel must obtain information that the State has
 2 and will use against the defendant is not simply a matter of common sense
 3 ... *'It is the duty of the lawyer to conduct a prompt investigation of the*
 4 *circumstances of the case and to explore all avenues leading to facts*
 5 *relevant to the merits of the case and the penalty in the event of conviction.*
 6 The investigation should always include efforts to secure information in
 7 the possession of the prosecution and law enforcement authorities. The
 8 duty to investigate exists regardless of the accused's admissions or
 9 statements to the lawyer of facts constituting guilt or the accused's stated
 10 desire to plead guilty.

11 *Id.* at 387 (citing 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.))
 12 (emphasis supplied).

13 Importantly, the Supreme Court has recognized that the investigation defense
 14 counsel is obliged to undertake requires input from the defendant. Effective defense
 15 "counsel's actions are usually based, quite properly, on informed strategic choices
 16 made by the defendant, and on information supplied by the defendant." *Strickland*,
 17 466 U.S. at 691.

18 **III. COURTS MAY TAKE STEPS TO ENSURE WITNESS** 19 **SAFETY BUT NOT AT THE COST OF A DEFENDANT'S** 20 **EFFECTIVE PREPARATION OF A DEFENSE.**

21 Protective orders, if entered, cannot violate a defendant's Fifth and Sixth
 22 Amendment rights. They may not contain provisions that deprive a defendant of a
 23 fair trial or other constitutional rights, including the right to the effective assistance
 24 of counsel. *United States v. Moussaoui*, 382 F.3d 453, 466, n.18 (4th Cir. 2004);
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1 *Eniola v. United States*, 893 F. 2d 383, 386-88 (D.C. Cir. 1990). No federal rule or
2 statute authorizes the entry of an order which prevents defense counsel from
3 obtaining material evidence or conducting investigation designed to secure
4 exculpatory witness statements. A protective order may not interfere with a
5 defendant's constitutional right to prepare his defense. *See United States v. Dumeisi*,
6 424 F.3d 566, 578 (7th Cir. 2005) (recognizing CIPA's purpose as to "protect[] and
7 restrict [] the discovery of classified information in a way that does not impair the
8 defendant's right to a fair trial") (quoting *United States v. O'Hara*, 301 F.3d 563,
9 569 (7th Cir. 2002)); *United States v. Lindh*, 198 F.Supp. 2d 739, 741-722 (E.D. Va.
10 2002) (restrictions on classified information must be no broader than necessary to
11 accomplish protective goals and may not unnecessarily burden right to prepare a
12 defense).

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14 The defense submit that its proposed protective order strikes a reasonable
15 balance between the concerns of all parties. It allows the defense to adequately
16 prepare its case by reviewing necessary discovery with their respective clients, while
17 maintaining substantial restrictions and limitations that alleviate the government's
18 concerns. Among other restrictive provisions, the defense proposed protective order
19 restricts defendants' review of the unredacted discovery:
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- to review only in the presence of defense counsel or authorized persons. Defense Proposed Order, Section 2(c);
- prohibits defendants from obtaining, maintaining or taking copies of the unredacted materials. *Id.*;
- uploaded on an approved tablet and any notes taken during review of the discovery, including the unredacted materials on an approved tablet, must be made electronically on the approved tablet. Defense Proposed Protective Order, Section 3 (c); and
- Defendants will not be provided writing instruments or paper while using the approved tablet and is prohibited from making any notes about the unredacted materials except on an approved tablet, which will be retrieved and maintained by the jail. Defense Proposed Protective Order, Section (3) (a) – (d).

On the contrary, the government's proposed protective order not only unreasonably delays counsels' review of the discovery with their respective clients until two weeks of trial, but does not include any of the restrictions set out in the defense's proposed protective order once review is permitted.

For the reasons set out above, the defense respectfully requests the Court to grant the defense's proposed order.

1 DATED this 6th day of November, 2020.

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